



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2010

Ms. Bertha Bailey Whatley
Chief Legal Counsel & Public Information Officer
Fort Worth Independent School District
100 North University Drive
Fort Worth, Texas 76107

OR2010-14528

Dear Ms. Whatley:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 394539.

The Fort Worth Independent School District (the "district") received a request for twelve categories of information pertaining to named district employees and the Arlington Heights High School. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note you have only submitted information responsive to the portion of the request seeking the evaluations of the named district employees and specified complaints. We assume, to the extent any additional types of responsive information existed when the district received the request for information, you have released it to the requestor. If not, then you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, we address your assertion that the district does not maintain the requested criminal history records. You state the district "no longer maintains written copies of the criminal records history of certified employees[.]" You explain the district accesses this information through the Fingerprint-based Applicant Clearinghouse of Texas and the district's access to such information is restricted to "view only." The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 552.135. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. See Open Records Decision No. 643 (1996). We have determined that for the purposes of section 21.355, the word "teacher" means a person who is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.*

You assert most of the submitted information evaluates the performance of a teacher and administrators who held the appropriate certificates and were performing the functions of a teacher and administrators at the time of the evaluations. Based on your representations and our review, we find the information we have marked constitutes teacher or administrator evaluations subject to section 21.355. Accordingly, the district must withhold the marked information under section 552.101 of the Government Code on that basis. However, you have not demonstrated that any of the remaining information evaluates the performance of a teacher or administrator for purposes of section 21.355; thus, none of the remaining information at issue may be withheld on that ground.

Section 552.101 also encompasses information protected by the informer's privilege, which has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. See Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of

inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You assert a portion of the remaining information contains the identifying information of an individual who reported an alleged violation of law. However, the submitted documents indicate the alleged violation of law was first reported to the individual whose identity is at issue by district students and parents. Thus, it was the students and the parents, and not the individual concerned, who reported the alleged violation of law. We note that a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informant for purposes of the common-law informer’s privilege. Further, the individual concerned appears to be a district administrator. Thus, the administrator had a duty to notify the district of the student and parents’ allegation. The purpose of the informer’s privilege is to encourage “citizens” to report wrongful behavior to the appropriate officials. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege is not intended to protect the identities of public officials and employees who have a duty to report violations of the law. Cf. *United States v. St. Regis Paper Co.*, 328 F. Supp. 660, 665 (W.D. Wis. 1971) (concluding that public officer may not claim informer’s reward for service it is his or her official duty to perform). Therefore, having considered your arguments, we find you have failed to demonstrate the informer’s privilege is applicable to the information at issue, and the district may not withhold it under section 552.101 of the Government Code on that basis.

You also assert a portion of the remaining information is excepted from disclosure under section 552.135 of the Government Code, which provides the following:

(a) “Informer” means a student or a former student or an employee or former employee of a school district who has furnished a report of another person’s possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov’t Code § 552.135. We note the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of civil, criminal, or regulatory law. Thus, section 552.135 protects the identity of an informer, but does not protect witness information or statements. As previously explained, it was the students and parents involved, and not the administrator whose identity is at issue, who furnished the report of the alleged violation. See *id.* § 552.135(a). Therefore, the district may not withhold any portion of the remaining information under section 552.135 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Alvarado". The signature is fluid and cursive, with the first letter of the last name being a large, prominent capital "A".

Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tp

Ref: ID# 394539

Enc. Submitted documents

c: Requestor
(w/o enclosures)